Office-Supreme Court, U.S.
FILED
JUN 29 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-2015

In The

Supreme Court of the United States

October Term, 1980

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal From the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

William D. Dexter
General Counsel
Multistate Tax Commission

204 Custer Way
Tumwater, WA 98501
(206) 357-8000

Counsel for Amicus Curiae

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

COUNTER STATEMENT OF QUESTIONS PRESENTED

Whether the apportionment provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA) contravenes either the Due Process or Commerce Clause limitations of the United States Constitution, as interpreted and applied by the Idaho Supreme Court in the instant case, wherein it held that income from investments in stocks was apportionable to the extent such investments were utilized by ASARCO as an integral part of its trade or business operations which it carried on in part in Idaho for the tax years in question.

TABLE OF CONTENTS

	Pages
Counter Statement of Questions Presented	i
Introductory Statement	1
Statement of Interest	2
Counter Statement of the Case	5
The Argument:	
The Court should either dismiss this appeal or affirm the decision below because Woolworth has raised no substantial federal question.	7
A. Mobil did not limit the apportionability of dividends to dividends received by a payee corporation from payor corporations which conducted a unitary business with the payee corporation and it supports the apportionability of all income related to the taxpayer's unitary business.	7
B. Mobil did not require the court below to modify its holding in ASARCO that the UDITPA apportionment factors, without modification, constitutionally apportioned ASARCO's apportionable income, including income from its intangibles, to Idaho.	17
C. Mobil does not require this Court to exclude the dividends, interest and capital gains in question from apportionable income because their taxation is precluded by the commerce clause.	19

TABLE OF CONTENTS—Continued

Pages

D. To condition the constitutionality of inclusion of income from stock investments upon a finding that the investments are in corporations which conduct a unitary business with the investor is illogical and should not be read into Mobil. 20

Conclusion 22

TABLE OF CASES

Adams Express Co. v. Ohio State Auditor, 165 U. S. 194 (1896) 13, 18

Albany International Corp. v. Halperin, 388 A. 2d 901 (Me. 1978) 14

Appeal of W. J. Voit Rubber Co., May, 1947 C. C. H. Cal. Tax Rep. para 202-435 14

ASARCO v. Montana, — Mont. —, 567 P. 2d 901 (1977), appeal dismissed, 434 U. S. 1042 (1978) 16, 17

Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n., 266 U. S. 271 (1924) 9, 13

Butler Bros. v. McColgan, 315 U. S. 501 (1942) 9, 10, 13, 17, 18

Champion International Corp. v. Bureau of Revenue, 88 N. M. 411, 54 P. 2d 1330 (1975) 14

Exxon Corp. v. Wisconsin Dept. of Revenue, — U. S. —, 100 S. Ct. 2109 (1980) 13, 14, 17, 22

TABLE OF CASES—Continued

Pages

F. W. Woolworth Co. v. Commissioner of Taxes, 130 Vt. 544, 298 A. 2d 839 (1972) 14

F. W. Woolworth Co. v. Director of Div. of Taxation, 45 N. J. 466, 213 A. 2d 1 (1965) 14

Flint v. Stone Tracy Co., 220 U. S. 107 (1911) 13

Ford Motor Co. v. Beauchamp, 308 U. S. 331 (1939) 9, 10, 13

GTE Automatic Electric v. Allpin, 68 Ill. 2d 326, 369 N. E. 2d 941 (1977) 4

Great Lakes Pipeline Co. v. Commissioner of Taxation, 272 Minn. 403, 138 N. W. 2d 612 (1965), app. dism'd 384 U. S. 718 (1966) 14

Gulf Oil Corp. v. Morrison, 120 Vt. 324, 141 A. 2d 671 (1958) 14

Hans Rees' Sons, Inc. v. North Carolina, 283 U. S. 123 (1931) 8

In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968, 133 Vt. 132, 335 A. 2d 310 (1975) 14

International Harvester v. Department of Taxation, 322 U. S. 435 (1944) 12, 14

Japan Line Ltd. v. County of Los Angeles, 441 U. S. 434 (1979) 19

John Deere Plow Co. v. Franchise Tax Board, 38 Cal. 2d 214, 238 P. 2d 569 (1951), app. dismissed

TABLE OF CASES—Continued

Pages

for want of a substantial federal question, 334 U. S. 939 (1952) 14

Mobil Oil Corp. v. Comm'r. of Taxes of Vermont, 445 U. S. 425 (1980) 5, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22

Montana Department of Revenue v. American Smelting and Refining Co., — Mont. —, 567 P. 2d 901 (1977), app. dismissed, 434 U. S. 104 (1978) .. 14

Montgomery Ward & Co. v. Commissioner of Taxation, 276 Minn. 479, 151 N. W. 2d 294 (1967) 14

Moorman Mfg. Co. v. Bair, 437 U. S. 267 (1978) 9, 10, 13, 17

Qualls v. Montgomery Ward, 266 Ark. 207, 585 S. W. 2d 18 (1979) 14

Sperry & Hutchinson Co. v. Department of Revenue, 270 Or. 329, 527 P. 2d 729 (1974) 14

Underwood Typewriter Co. v. Chamberlain, 245 U. S. 113 (1920) 13

W. R. Grace & Co. v. Commissioner of Revenue, — Mass. —, 393 N. E. 2d 330 (1979) 14

Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940) 14

OTHER AUTHORITIES

11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B, p. 28 3

OTHER AUTHORITIES—Continued

Pages

Section 1(a) of UDITPA 3, 16

Survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977 4

Uniform Laws Annotated, Vol. 9A, p. 448 4

NO. 80-2015

In The

Supreme Court of the United States

October Term, 1980

ASARCO INCORPORATED (formerly AMERICAN SMELTING AND REFINING COMPANY),

Appellant,

vs.

IDAHO STATE TAX COMMISSION,

Appellee.

On Appeal From the Supreme Court of Idaho

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission in support of the Appellant's Motion to Dismiss or Affirm. Both parties to this proceeding have consented to the filing of this brief.[1]

[1]Originals of the consent letters have been filed with the Clerk of the Court.

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states, including Idaho and the District of Columbia as full members, and by 11 states as associate members.[2]

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatability in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[3]

---

[2]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and West Virginia. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Tennessee.

[3]The constitutionality of the Compact was upheld by the United States Supreme Court in *U. S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U. S. 452 (1978), affirming 417 F. Supp. 795 (S. D. N. Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer."

In fulfillment of these objectives, in the area of state income taxation of multistate-multinational business, Article IV of the Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA).[4] The purpose of UDITPA is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that have adopted it. It has been adopted by a great majority of the income tax states.[5] It applies to all classes of taxpayers (individuals, partnerships, etc.) except financial institutions and public utilities. It provides for the specific allocation or apportionment of all the income of all the included taxpayers except the personal service income of individuals. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of tangible property, payroll and sales. "Nonbusiness income" is specifically allocated as provided for therein.[6]

Pursuant to its authority under Article VII of the Compact, the Commission approved revised uniform allocation and apportionment regulations on February 21,

---

[4]UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957. Uniform Laws Annotated, Vol. 9A, p. 448, et seq.

[5]11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B, p. 28.

[6]Section 1 (a) of UDITPA defines "business income" as:

> Income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section 1 (e) defines nonbusiness income subject to specific allocation as "all income other than business income."

1973, which implement UDITPA. Idaho and approximately 17 other states have adopted these regulations substantially in the form as adopted by the Commission.[7] These regulations embody an interpretation of the language of UDITPA.

It is important that the UDITPA provisions be interpreted to carry out the purpose of the 29 states, including Idaho, in adopting the uniform allocation and apportionment rules contained therein. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.[8]

The Commission and its member states are concerned with the proposition advanced by ASARCO that, under the United States Constitution, dividends, interest and capital gains and presumably other income from business-related intangible property, must be arbitrarily assigned, for state income tax attribution purposes, to the commercial domicile or to the location of the payors of the income, rather than to where the taxpayer utilizes these intangible properties in the conduct of its unitary business activities, as required by a reasonable interpretation and application of the UDITPA definition of "business income".

More particularly, in the instant matter, the Commission and its member states are concerned with the

---

[7]Results of a survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

[8]Prefatory note to UDITPA, Uniform Laws Annotated, Vol. 9A, p. 448; *GTE Automatic Electric v. Allpin*, 68 Ill. 2d 326, 369 N. E. 2d 941 (1977) and Pierce, "The uniform Division of Income for State Tax Purposes," 35 Taxes 747 at 748 and 749 (1957).

novel proposition, advanced by ASARCO, that *Mobil Oil Corp. v. Comm'r. of Taxes of Vermont*, 445 U. S. 425 (1980) supports the proposition that only the income from investments in the stock of payors, which conduct a unitary business with a payee taxpayer is apportionable; and, if apportionable, this income must, as a matter of constitutional law, be attributable to the business activities of the payor corporations. The acceptance of this argument would require this Court to declare the attribution provisions of UDITPA unconstitutional even though UDITPA requires apportionment of only the unitary income of a unitary business which is carried on in part in the taxing state. The purpose of this brief is to demonstrate that *Mobil* and other controlling decisions of this Court preclude any such result and to indicate that this Court should either dismiss this appeal for want of a substantial federal question or affirm the decision below of the Idaho Supreme Court.

COUNTER STATEMENT OF THE CASE

The Commission accepts ASARCO's Statement of the Case except it *disagrees* with ASARCO's statements pertaining to its relationship with its subsidiaries from which it derived the dividends in question and with the Statement's omission of important facts.

Irrespective of how this relationship is described and characterized, it is important to note that there is no claim made by ASARCO that it, as a single corporate entity, did not conduct all of its own business operations as a single unitary business nor that the dividends, capital

gains and interest in question did not result from stock investments to further ASARCO's own business operations as a single corporate entity. In short, there is nothing in the record to establish that the dividends, capital gains and interest in question were not attributable to ASARCO's unitary business operations which it conducted in part in Idaho for the years in question. Neither is there anything in the record, except ASARCO's "separate accounting" argument, to establish that the UDITPA apportionment formula, as applied to ASARCO's total income from its unitary business, assigns any income to Idaho not reasonably related to ASARCO's Idaho activities for the years in question.

Irrespective of how ASARCO would characterize its relationship with its affiliated corporations in question, the controlling fact, as found by the Idaho Supreme Court, is that the dividends, capital gains and interest in question were derived by ASARCO from ASARCO's stock investments which it acquired, managed and disposed of as an integral and necessary part of its mining and smelting business which it carried on in part in Idaho for the years in question (Juris. Stat., p. 22a).

Based on this finding, which is not challenged here, the Idaho Supreme Court upheld that apportionability of the dividends, capital gains and interest in question as "business income," as defined in section 1 (a) of UDITPA. Also, based on its finding that ASARCO did not establish by clear and cogent evidence that the application of the UDITPA formula by Idaho to ASARCO's business income reached extra-territorial values on income, the Idaho Supreme Court denied ASARCO's claim for apportionment relief.

THE ARGUMENT

The Court should either dismiss this appeal or affirm the decision below because Woolworth has raised no substantial federal question.

A. Mobil Did Not Limit the Apportionability of Dividends to Dividends Received by a Payee Corporation From Payor Corporations Which Conducted a Unitary Business With the Payee Corporation and It Supports the Apportionability of All Income Related to the Taxpayer's Unitary Business.

An examination of the *Mobil* decision indicates that due process constitutional limitations are satisfied, if dividends are from stock investments related to the taxpayer's own unitary business which it conducts in part in the taxing state. Thus, ASARCO's contention that *Mobil* requires this Court to determine whether the UDITPA apportionment provisions are constitutional is totally without merit.

After citing the salient facts and the history of the proceedings, this Court defined the issue in *Mobil*. Since it found that Mobil did not question the accuracy or fairness of Vermont's apportionment formula, but rather elected to attack the tax base, it did not consider, "whether application of Vermont's formula produced a fair attribution of appellant's dividend income to that state." (445 U. S. 425, 434)

As to the reasonableness of the apportionment formula, it stated:

> "Nor has appellant undertaken to prove that the amount of its tax liability as determined by Vermont is 'out of all appropriate proportion to the business

> transacted by appellant in that State.' *Hans Rees & Sons v. North Carolina, ex re Maxwell,* 283 U. S. 123, 135 (1931)." (Footnote omitted; Ibid, at 437)

Mobil was then limited to the question of,

> "* * * whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method." (445 U. S. 425, 435)

In addressing this question, the *Mobil* court noted that the record lacked detail concerning the relationship of the activities of these corporations to Mobil's petroleum business. It found that, "Mobil offered no evidence that would undermine the conclusion that most, if not all, of its subsidiaries and affiliates *contribute to appellant's* [*Mobil's*] *worldwide petroleum enterprise.*" (Emphasis and bracketed material added; 445 U. S. 425, 435.)

This Court then considered the three principal constitutional arguments of Mobil: (1) that no "nexus" existed between Vermont and Mobil's management of its stock investments or between Vermont and the business activities of the dividend payor corporations; (2) that Mobil was subject to possible multiple taxation because of the power of the state of its commercial domicile (New York) to tax the dividends in full; and, (3) that Mobil was subject to multiple taxation at the international level because the dividends were from foreign sources.

In reference to Mobil's due process argument, this Court reaffirmed the propositions (1) that interstate commerce is not immune from a fairly apportioned state income tax; (2) that, for a state to tax income generated in interstate commerce, due process requires only a "min-

mal connection" between the interstate activities and the taxing state and "a rational relationship between the income attributed to the state and the intrastate values of the enterprise;" and (3) that due process does not invalidate a tax simply because it is "contingent upon events brought to pass without a state" (445 U. S. 425, 437).

The Court concluded that Mobil did not contest these general principles. The Court found that Mobil's due process "nexus" argument turned on something about the nature of dividend income that distinguishes it from operating income. From Mobil's argument, the Court discerned only two factors which Mobil contended would differentiate dividend income from operating income, namely, the alleged "foreign source" of the income and the fact that the income was received in the form of dividends.

The Court equated Mobil's "foreign source" due process argument with an effort by Mobil to "separately account" for dividends by ascribing to them a geographical "source." In disposing of this argument, the Court stated:

> "The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. *The Court has rejected that contention so long as the intra-state and extra-state activities formed part of a single unitary business.* See *Butler Bros. v. McColgan*, 315 U. S. 501, 506-508 (1942); *Ford Motor Co. v. Beauchamp*, 308 U. S. 331, 336 (1939); Cf. *Moorman Mfg. Co. v. Bair*, 437 U. S., at 272. * * *"
>
> "The Court has applied the same rationale to businesses operating both here and abroad. *Bass, Ratcliff &*

Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924), is the leading example." (Emphasis added; 445 U.S. 425, 438.)[9]

Then, it concluded:

> "As these cases indicate, *the linchpin of apportionability* in the field of state income taxation *is the unitary business principle.* In accord with this principle, *what appellant must show*, in order to establish that its dividend income is not subject to an apportioned tax in Vermont, *is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State.*" (445 U.S. 425, 439; Emphasis added.)

In disposing of the "form of dividends" argument, this Court rejected Mobil's contentions that its ownership or management of stock investments constituted a business distinct from its sale of petroleum products. In so doing, it stated:

---

[9]*Butler Bros. v. McColgan*, 315 U.S. 501 (1942), upheld the apportionment of the unitary income of Butler Bros. even though Butler Bros. had shown that the apportionment arrived at a substantially different result than its separate geographical accounting. It then held that "* * * the results of the accounting system employed by the appellant [Butler Bros.] do not impeach the validity or propriety of the formula which California has applied here." (315 U.S. 501 at 508).

In *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, the Supreme Court held that a proportionate value of Ford Motor Company far in excess of the value of properties located in Texas by "separate accounting" could be attributable to Texas for net worth franchise tax purposes because "In a unitary enterprise, property outside the state necessarily affects the worth of the privileges within the state." (308 U.S. 331 at 336).

In *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978), it held that apportionment, unlike "separate accounting" "* * * does not purport to identify the precise source of a corporation's profits; rather, it is employed as a rough approximation of a corporation's income that is reasonably related to the activities conducted within the taxing State." (437 U.S. 267 at 273).

> *"So long as dividends from subsidiaries and affiliates reflect profits derived from a functionally integrated enterprise, those dividends are income to the parent earned in a unitary business."* (Emphasis added; 445 U. S. 425, 440.)

It then concluded:

> "We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. *Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business."* (445 U. S. 425, 441, 442.)

By this statement, the Court did tie the apportionability of the dividends in question to the relationship between the business of the payor corporations and that of Mobil.

However, it assumed apportionability of dividends where the business activities of the payor corporations were related in some manner to the business of the payee corporations.

Furthermore, it did not condition apportionability on the conclusion that Mobil conducted a unitary business with the payor corporations.

These considerations alone, completely refute ASARCO's argument that *Mobil* requires this Court to review the ASARCO's decision below; for, clearly, the Idaho Supreme Court limited the apportionability of dividends in *ASARCO* to dividends ASARCO derived from investments in payor corporations whose businesses were related to ASARCO's non-ferrous metals business.

Inasmuch as due process and commerce clause issues are interrelated, *International Harvester Co. v. Department of Treasury,* 322 U. S. 340 at 353 (1944), disposition of the commerce clause issue in *Mobil* is relevant for due process purposes. In holding that dividends were subject to apportionment, *Mobil* rejected the claim that the commercial domicile had an exclusive right to tax the dividends in full; and, in case of conflict, opted for apportionment of income from intangibles which were from investments related to the unitary business of the taxpayer. As stated in *Mobil:*

> "[10, 11] Taxation by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained. See *Standard Oil Co. v. Peck,* 342 U. S. 382, 384, 72 S. Ct. 309, 310, 96 L. Ed. 427 (1952). We find no adequate justification, however, for such a preference. Although a fictionalized situs for intangible property sometimes has been invoked to avoid multiple taxation of ownership, there is nothing talismanic about the concepts of 'business situs' or 'commercial domicile' that automatically renders those concepts applicable when taxation of income from intangibles is at issue. The Court has observed that the maximum *mobilia sequenter personam,* upon which these fictions of situs are based, 'states a rule without disclosing the reasons for it.' *First Bank Stock Corp. v. Minnesota,* 301 U. S., at 241, 57 S. Ct., at 680 (1937). *The Court also has recognized that 'the reason for a single place of taxation no longer obtains' when the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction. Curry v. McCanless,* 307 U. S. 357, 367, 59 S. Ct. 900, 906, 83 L. Ed. 1339 (1939).
>
> [12, 13] The reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the present context."

* * *

"* * * there is no reason in theory why that power should be exclusive when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to benefits and privileges conferred by several States. These are the circumstances in which apportionment is ordinarily the accepted method. Since Vermont seeks to tax income, not ownership, we hold that its interest in taxing a proportionate share of appellant's dividend income is not overridden by any interest of the State of commercial domicile." (Emphasis added; 445 U. S. 425, 444, 445).

Here, it is clear that *Mobil* refers to the utilization of intangibles in the unitary business of the payee taxpayer.

Thus, for both commerce and due process purposes, the controlling question is whether stock investments, giving rise to dividends, are made in connection with or are in some way related to the unitary business of the recipient.

The decisions of this Court, including those relied on in *Mobil*, support this position. See, e. g., *Adams Express, supra; Bass, Ratcliff & Gretton v. State Tax Comm'n*, 266 U. S. 271 (1924); *Butler Bros. v. McColgan*, 315 U. S. 501 (1942); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911); *Underwood Typewriter Co. v. Chamberlain*, 245 U. S. 113 (1920); and *Moorman Mfg. Co. v. Bair, supra; Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U. S. 207 (1980); and *Ford Motor Co. v. Beauchamp, supra.*

All of these apportionment cases dealt with the unity of a single corporation; they upheld the apportionment of the entire property, values or income attributable to or arising in connection with the operations of a single unitary corporate entity. The same is true concerning

many state income tax cases which have applied the unitary concept in determining the apportionability of income from intangibles.[10] Nothing in *Mobil* conflicts with the holdings in these cases. This is affirmed beyond any question by this Court's decision in *Exxon, supra.*[11]

Mobil did not distinguish dividends from other income for constitutional purposes. Therefore, the same considerations were applied there to determine the apportionability of dividend income as were applied to determine the apportionability of any other class of income, i.e., whether the income is derived from investments or activities related to the taxpayer's unitary business.

---

[10]See, e. g., *International Harvester v. Department of Taxation,* 322 U. S. 435 (1944); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435 (1940); *Montgomery Ward & Co. v. Commissioner of Taxation,* 276 Minn. 479, 151 N. W. 2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation,* 272 Minn. 403, 138 N. W. 2d 612 (1965), app. dism'd 384 U. S. 718 (1966); *F. W. Woolworth Co. v. Director of Division of Taxation,* 45 N. J. 466, 213 A. 2d 1 (1965); *Gulf Oil Corp. v. Morrison,* 120 Vt. 324, 141 A. 2d 671 (1958); *F. W. Woolworth Co. v. Commissioner of Taxes,* 130 Vt. 544, 298 A. 2d 839 (1972); *Sperry & Hutchinson Co. v. Department of Revenue,* 270 Or. 329, 527 P. 2d 729 (1974); *Appeal of W. J. Voit Rubber Co.,* May, 1947 C. C. H. Cal. Tax Rep. para. 202-435; *In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968,* 133 Vt. 132, 335 A. 2d 310 (1975); *Albany International Corp. v. Halperin,* 388 A. 2d 901 (Me. 1978); *Champion International Corp. v. Bureau of Revenue,* 88 N. M. 411, 54 P. 2d 1330 (1975); *John Deere Plow Co. v. Franchise Tax Board,* 38 Cal. 2d 214, 238 P. 2d 569 (1951), app. dismissed for want of a substantial federal question, 334 U. S. 939 (1952); *Qualls v. Montgomery Ward,* 266 Ark. 207, 585 S. W. 2d 18 (1979); *Montana Department of Revenue v. American Smelting and Refining Co.,* — Mont. —, 567 P. 2d 901 (1977), app. dismissed, 434 U. S. 104 (1978); *W. R. Grace & Co. v. Commissioner of Revenue,* — Mass. —, 393 N. E. 2d 330 (1979).

[11]This is clearly demonstrated by Idaho's analysis of *Exxon* in its Motion to Dismiss or Affirm.

Obviously, apart from the unitary ties between the business of a payee corporation and that of payor corporations, there can exist a relationship between stock investments and the business of the payee corporation which is sufficient to justify the apportionment of dividends or other income from investments in intangibles.

The key question as to apportionability of income under due process limitations is: "Is the income from investments related to or made in furtherance of the unitary trade or business of the taxpayer?" Framing the due process issue in this manner does not mean that the relationship of the business of the payor to the business of the payee taxpayer is irrelevant in determining whether the income from stock investments is includable in apportionable income. It simply means that it is not controlling. A taxpayer might make a stock investment to obtain a market for its product or for a source of supplies. Such considerations are relevant however, only to determine the relationship of an investment to the unitary business of the taxpayer. Other considerations are equally important for this purpose.

That *Mobil* does not limit the apportionability of dividends to only those cases or circumstances where the payor corporations and the payee corporation are engaged in a single unitary business, is supported by the fact that *Mobil* upheld the apportionment of Mobil's ARAMCO dividends in which it owned only a 10% stock interest, which limited ownership precluded a finding that Mobil conducted a unitary business with ARAMCO. Inasmuch as Mobil's investment in ARAMCO stock assured it of a supply of crude oil in its petroleum business, ARAMCO dividends are clearly apportionable be-

cause the ARAMCO stock investment of Mobil is related to the petroleum business of Mobil.

Likewise, it seems clear that *Mobil* does not limit the apportionability of dividends to only those situations where the payor and payee corporations are engaged in similar lines of business.[12] Thus, nothing in *Mobil* would invalidate the apportionment of dividends as "business income" as defined in Section 1(a) of the Uniform Division of Income for Tax Purposes Act (UDITPA).[13]

In sum, *Mobil* supports the proposition that all "net income" received from stock and other investments held in connection with or for a purpose related to the payee's unitary business operations is subject to apportionment.[14]

---

[12]For example, in footnote 9 of the dissent in *Mobil*, (445 U. S. 425, 456), most of the corporations there listed are not in the same kind of business as Mobil and they are not controlled by Mobil. However, if Mobil's investments in the stock of these listed public utilities corporations were made by Mobil to insure sources of supply of energy for use in Mobil's petroleum business, there is a sufficient relationship between such stock investments and Mobil's petroleum business to support apportionability of the dividends received by Mobil from these investments.

[13]Section 1 (a) of UDITPA, as illustrated by the case of *ASARCO v. Montana*, — Mont. —, supra, 567 P. 2d 901 (1977), appeal dismissed, 434 U. S. 1042 (1978) simply requires a tie-in between the unitary business operations of the taxpayer and its stock investments from which dividends are derived.

[14]Given the history of the taxation of intangibles, the abstract nature of a net income tax, the lack of any fixed situs for intangible properties, and the fact that apportionment does not attempt to situs income to any source, this conclusion is amply justified.

B. Mobil Did Not Require the Court Below to Modify its Holding in ASARCO That the UDITPA Apportionment Factors, Without Modification, Constitutionally Apportioned ASARCO's Apportionable Income, Including Income From Its Intangibles, to Idaho.

Since Mobil did not contest the reasonableness of the Vermont three-factor apportionment formula in *Mobil,* this Court did not pass on this question. However, there is nothing in *Mobil* which changes one *iota* the burden imposed on ASARCO to establish by clear and cogent evidence that the UDITPA apportionment formula, as applied in *ASARCO,* taxed any extra-territorial income or values of ASARCO.

The *Mobil* court reaffirmed this test when it noted that Mobil had not proved that its Vermont income tax liability was "out of all appropriate proportion to the business of Mobil transacted in Vermont." (445 U. S. 425, 437).

The only ground asserted in *ASARCO* by ASARCO to invalidate the apportionment result was the fact the apportioned income exceeded the amount attributable to Idaho by ASARCO's separate accounting. Since "separate accounting" results do not invalidate an apportionment formula (*Butler Bros. v. McColgan, supra, Moorman Mfg. Co. v. Bair, supra, Exxon Corp. v. Department of Revenue of Wisc., supra*), ASARCO has not advanced any valid ground for apportionment formula relief.

The fact that apportionable income includes substantial amounts of income from intangible properties, does not trigger any apportionment relief as a matter of law. In fact, if intangible properties are associated with

the unitary business operations of a taxpayer, there is no logical reason why the income from these intangibles should not be assigned to where its unitary business operations are conducted as reflected by the UDITPA apportionment formula. *Adams Express v. Ohio State Auditor*, 166 U. S. 185, 218 (1896).

Principles enunciated in *Butler Bros. v. McColgan*, *supra*, are still controlling:

> "One who attacks a formula of apportionment carries the distinct burden of showing by 'clear and cogent evidence' that it results in extra-territorial values being taxed. See *Norfolk & Western Ry. Co. v. North Carolina*, 297 U. S. 682, 688, 56 S. Ct. 625." (315 U. S. 501, 507).
>
> • • •
>
> "At least since *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 S. Ct. 305, this Court has recognized that the unity of use and management of a business which is scattered through several states may be considered when a state attempts to impose a tax on an apportionment basis." (Ibid. at 508).
>
> • • •
>
> "We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula. We agree with the Supreme Court of California that *these factors may properly be deemed to reflect 'the relative contribution of the activities in the various states to the production of the total unitary income,' so as to allocate to California its just proportion of the profits earned from this unitary business. And no showing has been made that income connected with the unitary business has been used in the formula.*" (Emphasis added; Ibid., at 509).

Thus, *Mobil* does not require a modification of the UDITPA formula unless the formula, as applied, is shown to tax extra-territorial values or income; which is not the case here. To invalidate the apportionment result here in issue, ASARCO relied in the Court below on its separate accounting. Here, it contends that the formula is invalid as a matter of law because it does not include the factors of the payors of the dividends. Both positions are irrelevant.

C. Mobil Does Not Require This Court to Exclude the Dividends, Interest and Capital Gains in Question From Apportionable Income Because Their Taxation is Precluded by the Commerce Clause.

In resolving the multiple taxation commerce clause argument, the *Mobil* court rejected the arguments of Mobil based on speculative multiple taxation and *Japan Line Ltd. v. County of Los Angeles,* 441 U. S. 434 (1979).

In disposing of Mobil's reliance on *Japan Line,* this Court noted:

> "Appellants' attempted analogy between this case and *Japan Line* strikes us as forced. That case involved ad valorem property taxes assessed directly upon instrumentalities of foreign commerce. As has been noted, the factors favoring use of the allocation method in property taxation have no immediate applicability to an income tax." (100 S. Ct., at 1237).

ASARCO would distinguish Mobil by here arguing that it has established multiple taxation in fact by reference to the tax laws of foreign countries (Juris. Stat., p. 16, footnote 14).

However, the Court below found that ASARCO has not established that it was in fact subject to multiple tax-

ation and that the possibility of such double taxation has been rejected as a ground for invalidating an apportionment statute (Juris. Stat., p. 32a).

Thus, nothing in *Mobil* requires any modification of ASARCO on either domestic or foreign commerce grounds.

D. To Condition the Constitutionality of Inclusion of Income From Stock Investments Upon a Finding That the Investments are in Corporations Which Conduct a Unitary Business With the Investor is Illogical and Should Not Be Read Into Mobil.

Reg. IV.1.(c)(4) of the Commission UDITPA regulations sets forth the following examples of apportionable dividends income under UDITPA:

> "Example (ii): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are business income.
>
> "Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business operations consist solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing business. The dividends are business income.
>
> "Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for

these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are business income.

"Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are business income."

These examples are obvious illustrations of investments in stocks made for purposes clearly associated with the taxpayer's unitary business operations. An investment in stock for such a business purpose is further illustrated by the following hypothetical example:

Assume that Corporation X conducts a business which requires the use of substantial amounts of electrical energy and it desires to locate a plant in an area where the local electric utility does not have the existing capacity to furnish Corporation X with the needed energy. Assume further that Corporation X agrees with the local utility to supply it with capital to expand the utility's electrical energy capacity and purchases a minority stock interest in the utility for this purpose.

Under this example, it is clear that the stock was acquired for an essential purpose directly associated with the business of Corporation X. It is inconceivable that, under these facts, that the dividends from this stock, which represent at least in part Corporation X's deductable energy costs, cannot be apportioned for lack of a due process connection with Corporation X's business. Under this example, in a due process constitutional sense, why should the apportionability result be any different

than if Corporation X had acquired a controlling interest in the local utility or formed its own utility in which it owned a controlling interest? We can conceive no difference.

The foregoing examples are not constitutionally distinguishable from Mobil's investment in ARAMCO stock which was held apportionable in *Mobil*. In each instance, the controlling question is the relationship of the stock investments to the taxpayer's trade or business operations in the taxing state. If there is a relationship, due process is satisfied.

CONCLUSION

Inasmuch as the Supreme Court of Idaho's decision below is supported by substantial precedent of this Court, including its recent decisions of *Mobil* and *Exxon*, ASARCO has raised no substantial federal question by this appeal. The issues that ASARCO asserts were undecided by *Mobil* have been laid to rest by numerous decisions of this Court. They merit no further consideration. In substance, these issues are based on the erroneous and novel proposition that the income from stock investments, as a matter of constitutional law, is not income attributable to such investments, but, rather, constitute the income of the corporations in which the stock investments are made. ASARCO thus contends that its income from stock investments should be excluded from its apportionable business income under UDITPA; or if included, should be assigned to the corporations in which it made the stock investments. Therefore, it is respect-

fully submitted that this Court should either dismiss the appeal for a lack of a substantial federal question or affirm the judgment of the Idaho Supreme Court.

Respectfully submitted,

WILLIAM D. DEXTER

Counsel for Amicus Curiae